Supreme Court, U.S.
FILED

99 1878 FEB 16 2000
No. ——

IN THE
Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
MOHAMMAD SHARFUDDIN AHMED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID E. NAGLE
Counsel of Record
LECLAIR RYAN
707 E. Main Street, 11th Floor
Richmond, Virginia 23219
(804) 343-4077

REX DARRELL BERRY
DAVIS GRIMM PAYNE
MARRA & BERRY
1111 Third Avenue, Suite 1865
Seattle, Washington 98101
(206) 447-0182

Attorneys for Petitioner
Circuit City Stores, Inc.

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

28pp

QUESTIONS FOR REVIEW

1. Whether the Ninth Circuit erred in holding, directly contrary to the holding of every other United States Court of Appeals, that the Federal Arbitration Act does not apply to contracts of employment?

2. Whether the Ninth Circuit erred in holding, contrary to this Court's opinion in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 25 n.2 (1991), and the liberal federal policy favoring arbitration agreements, that any agreement to arbitrate between an employer and an employee constitutes an "employment contract" excluded from coverage under the Federal Arbitration Act?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City group common stock tracks the performance of Circuit City, while CarMax group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

TABLE OF CONTENTS

	Page
QUESTIONS FOR REVIEW	i
STATEMENT OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING REVIEW	6
I. THE NINTH CIRCUIT'S BROAD READING OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT AMONG THE LOWER COURTS	6
II. THE NINTH CIRCUIT'S BROAD VIEW OF WHAT CONSTITUTES AN "EMPLOYMENT CONTRACT" FOR PURPOSES OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT WITH SUPREME COURT AUTHORITY	11
III. THE NINTH CIRCUIT'S DECISION IS AN ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY	13
CONCLUSION	14
APPENDIX:	
Opinion of the United States Court of Appeals for the Ninth Circuit (*Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam))	1a

TABLE OF CONTENTS—Continued

Page

Order of the United States District Court for the Central District of California, Western Division (*Circuit City Stores, Inc. v. Ahmed*, Case No. 98-1377-LEW (C.D. Cal. April 6, 1998)) 5a

TABLE OF AUTHORITIES

CASES — Page

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 7, 9
Brown v. KFC Nat'l Management Co., 82 Haw. 226, 921 P.2d 146 (1996) 6, 11
Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999) (per curiam) 1, 5
Cole v. Burns Int'l Sec. Svcs., 105 F.3d 1465 (D.C. Cir. 1997) 8
Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999) (per curiam) 5, 8
Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) .. 7
Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972) 7
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3rd Cir.), *cert. denied*, 522 U.S. 915 (1997) 7
Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998) 10
Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361 (7th Cir.), *cert. denied*, 120 S.Ct. 44 (1999) 8
Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995) 8
McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998) 8
Michalski v. Circuit City Stores, Inc., 177 F.3d 634 (7th Cir. 1999) 10
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 10, 12
O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) 7
Paladino v. Avnet Computer Technologies, 134 F.3d 1054 (11th Cir. 1998) 8
Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 8
Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996) 7

TABLE OF AUTHORITIES—Continued

Page

Tenney Eng'g, Inc. v. United Elec. Radio and Mach. Workers of Am., 207 F.2d 450 (3rd Cir. 1953) 9

STATUTES

9 U.S.C. § 1 (1994) ..... *passim*
9 U.S.C. § 3 (1994) 2, 3, 4, 13
9 U.S.C. § 4 (1994) 2, 3, 4, 13
28 U.S.C. § 1254(1) (1994) 9
28 U.S.C. § 1332 (1996) 4
45 U.S.C. § 157 (1994 & Supp. III 1997) 9
46 U.S.C. § 651 (repealed 1983) 9
46 U.S.C. § 10302(b) (1994) 9

IN THE

Supreme Court of the United States

No. ———

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

MOHAMMAD SHARFUDDIN AHMED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 18, 1999.[1] In the alternative, Circuit City requests summary reversal of the Ninth Circuit's decision in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is here sought to be reviewed, is reported at *Circuit City Stores, Inc. v. Ahmed,*

[1] A separate Petition for a Writ of Certiorari is being filed concurrently herewith in a related case, *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), which was decided by the same Ninth Circuit panel on the same date, and presents the same questions for review.

195 F.3d 1131 (9th Cir. 1999) (per curiam), reprinted in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), provides in pertinent part:

> *Section One* "[C]ommerce," as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> * * * *
>
> *Section Three* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the Court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

> *Section Four* A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . .

9 U.S.C. §§ 1, 3, 4 (1994).

STATEMENT OF THE CASE

In March 1995, Circuit City implemented an "Associate Issue Resolution Program" ("AIRP"), which included as a component "final, binding arbitration of all employment-related legal disputes before a neutral arbitrator." (SER 118.)[2] For employees like Respondent Mohammad Sharfuddin Ahmed ("Ahmed"), who already were employed by Circuit City when the arbitration program was implemented, participation in the arbitration program was completely voluntary. (SER 114.)

At the time the arbitration program was implemented, Circuit City introduced the program to existing Associates through meetings, which included extensive written materials and a video presentation. On April 4, 1995, Ahmed signed an "Associate Receipt of Issue Resolution

---

[2] "ER" and "SER" cites refer to the Excerpts of Record and Supplemental Excerpts of Record on file with the Ninth Circuit Court of Appeals.

Package" form. (SER 114.) The package contained (1) an Associate Issue Resolution Handbook (SER 117-26), (2) the Circuit City Dispute Resolution Rules and Procedures,[3] and (3) a Circuit City "Opt-Out" Form. (SER 137.) These materials gave Ahmed express written instruction in several places that he had 30 days within which to "opt-out" of the arbitration program, or else Ahmed would be "required to arbitrate all employment-related legal disputes I may have with Circuit City." (SER 114.) Ahmed did not opt-out of the arbitration program. (SER 112.)

On December 15, 1997, contrary to the terms of the arbitration program, Ahmed sued Circuit City in a California superior court for a variety of employment-related legal claims. (SER 1-18.) Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA") and 28 U.S.C. § 1332 (1996), Circuit City filed a Petition to Stay State Court Action and to Compel Arbitration in the United States District Court for the Central District of California ("Petition"). (SER 19-109.) On April 7, 1998, the district court granted the Petition and entered an Order staying the state court action and compelling arbitration. (SER 139-41.)

Ahmed appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit recognized that "Ahmed merely signed a form acknowledging that he had received Circuit City's materials, and then Ahmed failed to opt-out of the arbitration agreement." *Ahmed*, 195 F.3d at 1132. The Ninth Circuit also recognized that the AIRP documents stated that "participation in the dispute resolution program was 'voluntary.'" *Id.* at 1133. The

---

[3] The Dispute Resolution Rules and Procedures contain the rules and procedures governing arbitrations conducted pursuant to the parties' agreement to arbitrate. (SER 127-36.)

Ninth Circuit further stated that "the agreement in this case was *not* a condition precedent to employment." *Id.* (emphasis added).

The Ninth Circuit next concluded that "the language is in the form of an express agreement between Ahmed and Circuit City," and that "the employer intended it to be binding." *Id.* Although the Ninth Circuit agreed that the arbitration program was not a condition precedent to employment, the court concluded that the agreement to arbitrate "was an employment contract, rendering the FAA inapplicable."[4] *Id.* The Ninth Circuit based this holding on its prior decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam), which held, contrary to every other federal court of appeals in the United States, that the statutory exclusion found at Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), must be read broadly to exclude coverage of all contracts of employment. *See Ahmed*, 195 F.3d at 1133, *citing Craft*, 177 F.3d at 1094.

As a result, the Ninth Circuit reversed the decision of the district court compelling arbitration, and remanded the case to the district court for dismissal "because of a lack of federal authority." *Id.*

---

[4] This holding appears to be directly at odds with the Ninth Circuit's ruling in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), the companion case in which a writ of certiorari also is sought. In *Adams*, the Ninth Circuit concluded that the arbitration agreement at issue was an "employment contract" precisely because "the agreement was a condition precedent to employment." *Id.* at 1071 (emphasis added).

REASONS FOR GRANTING REVIEW

I. THE NINTH CIRCUIT'S BROAD READING OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT AMONG THE LOWER COURTS.

By holding that the district court lacked authority to compel arbitration, the Ninth Circuit has interpreted the exclusion found in Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), in a manner which directly conflicts with every other United States Court of Appeals. The decision also conflicts directly with the decision of a state court of last resort within the geographic area covered by the Ninth Circuit. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996). Finally, the Ninth Circuit's decision also raises an important issue not settled by the Supreme Court, which in fact has expressly been reserved by this Court.[5]

Based on a broad reading of the FAA Section One exclusion, the Ninth Circuit made the blanket pronouncement that "the FAA does not apply to labor or employment contracts," *Ahmed*, 195 F.3d at 1132, and further interpreted "employment contracts" broadly to encompass virtually all contracts between employers and employees. *Id.* Thus, in the Ninth Circuit's view, no agreement to

---

[5] This Court previously has reserved the question of the proper scope to be given to the FAA Section One exclusion. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (Court "leave[s] for another day the issue raised by amici curiae" as to proper scope of the FAA Section One exclusion). This question was reserved over the dissent of Justice Stevens and Justice Marshall. *Id.* at 36. As in *Gilmer*, the arbitration program at issue here also is not part of a "contract of employment." *See infra* Section II.

arbitrate disputes entered into by an employer and an employee may be enforced pursuant to the FAA. *Id.*

However, this broad reading of the FAA Section One exclusion directly conflicts with *every* other federal appellate court. Rather, every other United States Court of Appeals has found the FAA Section One exclusion to be narrow, applying only to employment contracts of seamen, railroad workers, and other employees actually engaged in the movement of goods in interstate commerce. *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive interpretation to the exclusionary language of [FAA] Section 1."); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3rd Cir.), *cert. denied*, 522 U.S. 915 (1997) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels of commerce itself."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this Section 1 exemption."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of work-

ers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers . . . ."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that Section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce."); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce."); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the Court) (narrow construction of FAA Section One exclusion "accords with the statute's text and history"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA only excludes from the provisions of the Act the employment contracts of workers engaged in the transportation of goods in commerce.").

Further, since the Ninth Circuit decided *Craft*, the Seventh Circuit expressly has considered and disagreed with *Craft*. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 363-64 (7th Cir.), *cert. denied*, 120 S.Ct. 44 (1999). ("We acknowledge that our finding of jurisdiction [under the FAA] is in disagreement with the Ninth Circuit, which recently held that all contracts of employment are outside the scope of the FAA. However, other circuits which have addressed this issue have concluded, as we have, that such employment contracts are not excluded from the purview of the FAA.") (citations omitted).

Thus, the Ninth Circuit stands alone in its view that the FAA Section One exclusion reaches all contracts of employment. In contrast, the more logical view is that when drafting the FAA Section One exclusion, Congress had in mind specific transportation workers for whom special arbitration legislation already existed. In *Tenney Eng'g, Inc. v. United Elec. Radio and Mach. Workers of Am.*, 207 F.2d 450 (3rd Cir. 1953), the Third Circuit Court of Appeals analyzed the scope of the FAA Section One exclusion. Considering the text of the statute as well as the legislative history, the Court concluded that when the FAA originally was drafted in 1925, Congress was aware that statutory arbitration mechanisms already existed for seamen (46 U.S.C. § 651)[6] and railroad employees (Railway Labor Act § 7, 45 U.S.C. § 157 (1994 & Supp. III 1997)). *Id.* at 452, n.7, 8; *see also Asplundh Tree Expert Co. v. Bates*, 71 F.3d 593, 601 (6th Cir. 1995) (finding FAA Section One exclusion to have been added by Congress to overcome objections of Seamen's Union). In the Third Circuit's view, Congress's addition of language regarding "any other class of worker engaged in foreign or interstate commerce" was intended:

> to include only those other classes of workers who are likewise engaged directly in commerce . . . . The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

Tenney at 452-53.

As a result of the Ninth Circuit's solitary position, an intolerable conflict is presented. Specifically, employers

---

[6] The seamen arbitration statute in effect when the FAA was drafted later was repealed, *see* Pub. L. 98-89, Aug. 26, 1983, leaving to seamen other statutory dispute resolution procedures. *See, e.g.*, 46 U.S.C. § 10302(b) (1994).

within the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands, now are precluded from relying on the FAA in federal court to enforce arbitration agreements with employees who are not transportation workers. However, employers and employees in forty-one other states and Puerto Rico may obtain precisely that relief.

Likewise, the conflict presents a predicament for large national employers like Circuit City, with operations both within and outside the geographic area covered by the Ninth Circuit. Such employers who use the same arbitration agreement for their entire workforce now are barred from seeking enforcement of arbitration agreements pursuant to the FAA in federal courts within the Ninth Circuit, while such relief is available outside the Ninth Circuit. As a result, the Ninth Circuit's position creates an intolerable conflict affecting thousands of employers and many hundreds of thousands of employees.

This conflict is not simply hypothetical, but actually exist for the petitioner. Two other federal courts of appeals have reviewed the same arbitration program under the FAA. *See Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir. 1998) (recognizing that " 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration' ") (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 637 (7th Cir. 1999) (enforcing the arbitration agreement under the FAA). Neither court found the agreement to arbitrate to be an "employment contract," or otherwise excluded from coverage under the FAA.

Finally, the Ninth Circuit's decision on this issue also directly conflicts with that of the Supreme Court of Hawaii, located within the Ninth Circuit's geographic area. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996) ("[W]e believe that the narrow interpretation of the Section 1 exclusion is correct. . . ."). Thus, employers and employees in Hawaii, including Circuit City, seeking enforcement of arbitration agreements under the FAA are faced with directly conflicting interpretations of the FAA, depending on whether they seek to compel arbitration in state or federal court. A definitive ruling by this Court as to the proper scope of the FAA Section One exclusion will remove these intolerable conflicts.

II. THE NINTH CIRCUIT'S BROAD VIEW OF WHAT CONSTITUTES AN "EMPLOYMENT CONTRACT" FOR PURPOSES OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT WITH SUPREME COURT AUTHORITY.

Review of the Ninth Circuit's decision is warranted for a second and separate reason. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expressly declined to address the issue of the appropriate scope of the FAA Section One exclusion because the arbitration agreement presented there was contained in a securities industry "U-4" registration form ("Form U-4"), required as a condition precedent to working as a broker in the securities industry, rather than in an employment contract. *Id.* at 25 n.2. As a result, the clear direction from this Court is that, regardless of the "broad" or "narrow" scope of the FAA Section One exclusion, arbitration agreements which are not "contracts of employment" are not excluded from coverage by the FAA. *Id.*

Like the arbitration agreement contained in a securities registration application in *Gilmer*, 500 U.S. at 25 n.2,

this arbitration agreement is not contained in a contract of employment and, accordingly, the exclusionary language of FAA Section One cannot apply. Specifically, in *Gilmer*, this Court found that agreement to the terms of the Form U-4, including the obligation to arbitrate, was a condition precedent to employment. *Id.* at 25 n.2. Failure of a prospective applicant to execute the Form U-4 barred employment not only with one prospective employer, but with any employer in the securities industry. *Id.* In sharp contrast, even the Ninth Circuit recognized that the AIRP documents stated that participation was "voluntary," and accordingly held that participation in the arbitration program was "*not* a condition precedent to employment." *Ahmed*, 195 F.3d at 1133 (emphasis added). Ahmed only had to "opt-out" of the arbitration program, and could have continued in his employment with Circuit City without any requirement to arbitrate his employment-related legal disputes. (SER 114.) By failing to "opt-out," Ahmed accepted Circuit City's offer to arbitrate his claims. (*Id.*) Thus, if the separate, standalone Form U-4 agreement, which is a condition precedent to employment, is not an "employment contract," Ahmed's agreement to arbitrate by failing to opt-out of the arbitration program, which is not a condition precedent to employment, cannot be an "employment contract."

In conclusion, even if the Ninth Circuit is correct (and every other federal court of appeals is wrong) in its broad reading of the scope of the FAA Section One exclusion, the decision that Ahmed's agreement to arbitrate falls within the FAA Section One exclusion as a "contract of employment," still conflicts with this Court's opinion in *Gilmer, supra*, and with the "liberal federal policy favoring arbitration agreements" reflected in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

III. THE NINTH CIRCUIT'S DECISION IS AN ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY.

The Ninth Circuit's erroneous interpretations of (1) the scope of the FAA Section One exclusion, and (2) what constitutes a "contract of employment," have a serious and immediate impact on thousands of employers and employees. For example, Circuit City is a national company employing approximately 60,000 Associates. The Company has approximately 10,000 Associates employed in the nine states within the Ninth Circuit. If the Ninth Circuit's decision is permitted to stand, Circuit City will be in the untenable position of being permitted to move to compel arbitration pursuant to the FAA in every court except those under the authority of the Ninth Circuit.

This serious and immediate impact is not limited to Circuit City, but is shared by all businesses that employ persons both within and outside the geographic scope of the Ninth Circuit. The Ninth Circuit's erroneous rulings present for them the same intolerable conflict.

Moreover, employers who operate solely within the nine states covered by the Ninth Circuit now are deprived completely of their federal statutory right to seek enforcement in federal court of agreements to arbitrate employer-employee disputes, a right expressly granted to them by Congress when enacting the FAA, *see* 9 U.S.C. §§ 3, 4 (1994), and recognized by this Court. *See Gilmer*, 500 U.S. at 24-25. By contrast, their counterparts in forty-one other states may pursue this relief.

Lastly, under *Ahmed, supra*, the Ninth Circuit's view is that any agreement requiring arbitration of disputes between employers and employees is a "contract of employment" excluded from coverage by the FAA. In contrast, employers and employees outside the Ninth Circuit

with such agreements are not deprived of the statutory protections and procedures available in the FAA. By granting certiorari on the issues presented, this Court can remove the conflicts currently existing and ensure a nationally uniform interpretation of the FAA's Section 1 exclusion.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. As an alternative to granting this Petition, Circuit City respectfully requests summary reversal of the Ninth Circuit's decision in this case.

Respectfully submitted,

DAVID E. NAGLE
Counsel of Record
LECLAIR RYAN
707 E. Main Street, 11th Floor
Richmond, Virginia 23219
(804) 343-4077

REX DARRELL BERRY
DAVIS GRIMM PAYNE
MARRA & BERRY
1111 Third Avenue, Suite 1865
Seattle, Washington 98101
(206) 447-0182

Attorneys for Petitioner
Circuit City Stores, Inc.

February 16, 2000

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-55896

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Petitioner-Appellee,

v.

MOHAMMAD SHARFUDDIN AHMED,
Respondent-Appellant.

Argued and Submitted October 4, 1999
Filed November 18, 1999

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-98-01377-LEW
Laughlin E. Waters, District Judge, Presiding
Manuel L. Real, District Judge, Presiding

Before: Betty B. Fletcher, Dorothy W. Nelson, and Melvin Brunetti, Circuit Judges.

OPINION

PER CURIAM:

This is an appeal from the district court's final order compelling arbitration under the Federal Arbitration Act, 9 U.S.C.A. § 1, et seq. (West 1999) ("FAA"). We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court, however, lacked the authority, as a matter of substantive law, to compel arbitration because the Federal Arbitration Act does not apply to this case. In *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999), we held that the FAA does not apply to labor or employment contracts.

Factual and Procedural Background

Mohammad Sharfuddin Ahmed appeals the district court's order staying his state court action and compelling arbitration. Circuit City sought mutually binding arbitration under Section 4 of the FAA in response to Ahmed's state court lawsuit under the California Fair Employment and Housing Act ("FEHA").

In March 1995, Ahmed began working as a sales counselor at Circuit City. A month later, Circuit City instituted an "Associates Issue Resolution Program" that included a provision calling for "binding arbitration of legal disputes." On April 4, 1995, Ahmed signed an "Associate Receipt of Issue Resolution Package" form. The package contained (1) an Associate Issue Resolution Handbook, (2) the Circuit City Dispute Resolution Rules and Procedures, and (3) a Circuit City "Opt-Out" Form. If Ahmed did not mail the opt-out form to Circuit City within 30 days, the materials indicated in several places that Ahmed would be "automatically part of the arbitration program" and "required to arbitrate all employment related legal disputes" with Circuit City. Ahmed did not mail in the opt-out form.

Standard of Review

The Ninth Circuit reviews de novo the district court's order compelling arbitration. See *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986). The existence of subject matter jurisdiction is a question of law reviewed de novo. See *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1153 (9th Cir. 1998).

Discussion

Circuit City sought arbitration pursuant to Section 4 of the FAA and asserted jurisdiction pursuant to Section 4 and 28 U.S.C. § 1332. We recognize that the FAA is not a jurisdictional statute:

> [The FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under [§ 1331] or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other basis for federal jurisdiction.

Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). In this case, we need not consider whether the district court had underlying federal question jurisdiction because the FAA is inapplicable. As a threshold matter, therefore, the district court lacked the authority under Section 4 of the FAA to compel arbitration.

We must find that the FAA is inapplicable to this case under *Craft* if the failure to opt-out of the dispute resolution program constitutes an employment contract. This

court has defined an "employment contract" as "an agreement setting forth 'terms and conditions' of employment." *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1376 (9th Cir. 1994) (quoting Black's Law Dictionary 525 (6th ed. 1990)).

In this case, Ahmed merely signed a form acknowledging that he had received Circuit City's materials, and then Ahmed failed to opt-out of the arbitration agreement. Ahmed's signed receipt of materials and his failure to opt-out constitutes an employment contract with Circuit City. The receipt form that Ahmed signed indicated that he had received the dispute resolution handbook, the procedures manual, and the opt-out form. Furthermore, it expressly stated the terms and conditions of the arbitration agreement. It indicated that participation in the dispute resolution program was "voluntary." The form's final sentence said: "I understand that if I do not mail the [opt-out] Form within 30 calendar days, I will be required to arbitrate all employment-related legal disputes I may have with Circuit City."

This language is in the form of an express agreement between Ahmed and Circuit City. Although the agreement in this case was not a condition precedent to employment, the employer intended it to be binding. The agreement was an employment contract, rendering the FAA inapplicable. See *Craft*, 177 F.3d at 1094. Thus, we reverse the district court's order compelling arbitration and remand to the district court for dismissal because of a lack of federal authority.

REVERSE AND REMAND.

[Filed Apr. 6, 1998]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. 98-1377 LEW

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Petitioner/Plaintiff,

v.

MOHAMMAD SHARFUDDIN AHMED,
a California resident,
Respondent/Defendant.

ORDER STAYING STATE COURT ACTION
AND COMPELLING ARBITRATION

THIS MATTER, having come regularly before the Court and the Court having considered the Notice of Hearing on Petition to Stay State Court Action and to Compel Arbitration, the Petition to Stay State Court Action and to Compel Arbitration, and exhibits thereto, the Declaration of Pamela G. Parsons In Support of Petition to Stay State Court Action and to Compel Arbitration, and exhibits thereto, and this [Proposed] Order Staying State Court Action and Compelling Arbitration, all filed by Petitioner Circuit City Stores, Inc. ("Circuit City"); and Respondent Mohammad Sharfuddin Ahmed's opposition thereto; Respondent having appeared through

his counsel of record, the Law Offices of Andrew Wyatt, and Circuit City having appeared through its counsel of record, Davis, Grimm & Payne and Paul, Hastings, Janofsky & Walker, LLP; and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The California Superior Court lawsuit currently pending in Los Angeles County as Case No. BC 182818 is hereby stayed in its entitrety pending completion of the arbitration of this dispute;

2. All claims raised by Respondent in the Los Angeles County Superior Court Lawsuit, Case No. BC 182818, are hereby compelled into arbitration pursuant to the Dispute Resolution Agreement between Respondent and Circuit City.

3. The action is dismissed.

DONE IN OPEN COURT this 6th day of April, 1998.

/s/ Manuel L. Real
United States District Court Judge
For Laughlin E. Waters